Alison Frankel's ON THE CASE

Twombly, Iqbal rulings have 'substantial impact': study

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Two of the most controversial U.S. Supreme Court rulings of the last decade are 2007's Bell Atlantic v. Twombly and its 2009 follow-on *Ashcroft v. Iqbal*. In *Twombly*, an antitrust case, the Court set a new, higher standard for what plaintiffs must allege in their complaints in order to survive a defense motion to dismiss; in *Iqbal*, it extended the higher pleading standard to cases outside of the antitrust realm. Ever since, law professors, practitioners, judges, and politicians have debated the impact of the two rulings. As you might expect, plaintiffs' lawyers and their supporters argue that good cases are being dismissed. Defendants counter that *Twombly* and *Iqbal* haven't affected meritorious cases. (Here's a sampling of perspectives from a December 2009 Senate Judiciary Committee hearing on the two opinions.)

In March, the Federal Judicial Center put out a 52-page report that seemed to minimize the effects of *Twombly* and *Iqbal*. The study of motions activity in 23 federal districts, undertaken at the behest of the Judicial Conference's advisory committee on civil rules, found that there was an increase in the rate of motion-to-dismiss filings in the wake of the two rulings, but also found no general increase in the rate at which federal judges granted motions to dismiss with prejudice. "There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case," the report said.

But a forthcoming Yale Law Journal note by a second-year Yale Law student suggests that *Twombly* and *Iqbal* commentators haven't been making the right comparisons. And this isn't just any law student: Jonah Gelbach is an economics professor who spent 12 years on the faculty at the University of Maryland and the University of Arizona. In the paper, a version of which Gelbach presented earlier this month at the Conference on Empirical Legal Studies, the econometrician argues that a simple comparison of dismissal rates isn't the proper way to evaluate the impact of *Twombly* and *Iqbal*. The FJC's study, Gelbach said, indicates that defendants are more than 50 percent more likely to file a motion to dismiss now than they were before *Twombly* and *Iqbal*. Even if the overall rate of dismissal hasn't changed -- and even if the rate of dismissal of the complaints that wouldn't have been challenged before *Twombly* and *Iqbal* is lower than the overall dismissal rate -- that means a higher percentage of cases is subject to dismissal before reaching discovery. According to Gelbach, 20 percent more cases fail to reach discovery under the heightened pleading standards imposed by *Twombly* and *Iqbal*.

Gelbach's report also contends that previous studies haven't accounted for cases plaintiffs didn't bother to file for fear of *Twombly* and *Iqbal* dismissal motions. Failing to consider that effect, he said, means those studies have underreported the impact of the rulings. "Findings of 'small' positive differences, zero differences, and even negative differences all are consistent with the hypothesis that heightened pleading has reduced discovery access," Gelbach wrote. "This point has largely been missed in the empirical literature on *Twombly* and *Iqbal*." Much math follows, including an analysis of how *Twombly* and *Iqbal* have affected the settlement calculus, but Gelbach's takeaway is that "among cases not involving financial instruments, civil rights, or employment discrimination, at least 18 percent of those that faced a [motion to dismiss] during the post-Iqbal period ultimately will have been prevented from reaching discovery as a result of the switch to heightened pleading," he wrote. "This effect dwarfs the observed difference in MTD grant rates, which is practically zero."

I first read about Gelbach's paper at the Drug and Device Law Blog and spoke to him Monday about it. Gelbach warned that it's impossible to predict the impact of *Twombly* and *Iqbal* on any particular case and that it's tough to assess the rulings' broader impact without knowing more about the cases that

plaintiffs aren't bothering to file. He said, however, that he believes he's come up with a different way to measure the heightened pleading standard. If fewer cases are making it past the motion to dismiss stage, he said, the rate of summary judgment motions and grants should be falling. Gelbach and some colleagues are in the process of collecting data to test that hypothesis.